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No. 81-2242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE W. SEIBEL, individually and as a police officer of the City of Chicago Police Department,

Petitioner,

vs.

N. W. WHITLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 4, 1982

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QUESTION PRESENTED

Whether a state court determination of probable cause for an arrest collaterally estops a subsequent action for false arrest pursuant to 42 U.S.C. §1983.

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GEORGE W. SEIBEL, individually and as a police officer of the City of Chicago Police Department,

Petitioner,

vs.

N. W. WHITLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Your Petitioner, George W. Seibel, individually and as a police officer of the Chicago Police Department, respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Seventh Circuit, entered in this proceeding on March 25, 1982.

OPINIONS BELOW

The memorandum opinion and order of the district court in favor of plaintiff-respondent, entered June 2, 1980, is unreported but is reproduced below in Appendix B.

The opinion of the Court of Appeals, filed March 25, 1982, affirming the judgment of the district court is not yet reported. It is reproduced in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 25, 1982. On May 6, 1982, the Court of Appeals granted petitioner's motion to stay the issuance of the mandate until June 7, 1982.

This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

United States Code

Title 42 U.S.C. §1983:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.

Illinois Revised Statutes

Chapter 38, par. 109-3(a):

Preliminary examination.

The judge shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant.

STATEMENT OF THE CASE

Respondent, N. W. Whitley, was arrested on October 7, 1974, for a traffic violation in the City of Chicago. As a result of this arrest, respondent was identified by a Mr. and Mrs. James Williams as the man who had broken into their home and sexually assaulted Mrs. Williams. Respondent denied the Williams' charges and offered an alibi defense which petitioner Seibel, a Chicago police officer, was assigned to investigate.

Petitioner Seibel was unable to verify the alibi with the information supplied him and on October 14, 1974, plaintiff was arrested on a complaint signed by the Williams' charging respondent with armed robbery and deviate sexual assault.

Respondent was incarcerated in the Cook County Jail for one month, until November 14, 1974, when a preliminary hearing was held in the Criminal Court of Cook County. Mrs. Williams testified for the state and identified the plaintiff as the man who assaulted her. Respondent, who was represented by private counsel, made no mention of the alleged alibi. A finding of probable cause was made on all counts and respondent was later indicted by the Grand Jury of Cook County, Illinois.

Whitley remained in custody until February 3, 1975, the criminal trial date. Evidence supporting the alibi was presented and the charges against respondent were dismissed.

On July 14, 1976, respondent filed a complaint in the United States District Court for the Northern District of Illinois alleging that petitioner, an investigator in the Chicago Police Department, arrested him without probable cause. The complaint was based upon 42 U.S.C. §§1981, 1983 and 1985, with jurisdiction premised upon 28 U.S.C. §1331. Respondent alleged that petitioner did not properly investigate his alibi defense, resulting in an unconstitutional incarceration in Cook County Jail for 113 days.

On November 9, 1978, judgment was entered for respondent and $40,000.00 in damages were awarded. Petitioner appealed this judgment. The Court of Appeals for the Seventh Circuit remanded the case for a new trial to correct an erroneous jury instruction regarding the Illinois law on preliminary hearings. The case was tried a second time. On June 2, 1980, respondent was awarded damages of $60,000.00 (Appendix B).

Petitioner took a second appeal. Respondent cross-appealed the attorneys' fee of $10,000.00 awarded under 42 U.S.C. §1988, claiming they were insufficient. On March 25, 1982, the Court of Appeals rendered its decision affirming, in total, the judgment of the district court (Appendix A). This petition for writ of certiorari is based upon this second opinion of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S OPINION IN *ALLEN v. McCURRY*.

The question presented in this case is whether a state judicial determination that probable cause existed for respondent's arrest precludes a subsequent action for false arrest under the provisions of 42 U.S.C. §1983. In *Allen v. McCurry*, 449 U.S. 90 (1980), this court held that issues decided in state court proceedings were to be given *res judicata* effect in subsequent federal civil rights litigation. Despite this holding, the court of appeals below refused to accept a state judicial determination that probable cause existed for respondent's arrest, a determination that completely precludes a subsequent civil rights action for false arrest.

Footnote 18 of the *McCurry* opinion clearly states that "a state court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith." 449 U.S. at 102. A finding that probable cause existed for an arrest is a complete defense to a civil rights suit for false arrest. *Pierson v. Ray*, 386 U.S. 547 (1967).

In the instant case, a probable cause hearing was held in the state criminal courts subsequent to the respondent's arrest. Respondent was represented by counsel of his choice and was identified by the victims as the man who attacked them. Although respondent claimed an alibi defense he chose not to present this defense at the preliminary hearing, although Illinois law gave respondent the right to present evidence in his behalf. Illinois Revised Statutes, 1973, Chapter 38, par. 109-3. The criminal court judge determined that probable cause existed for respondent's arrest and respondent was held

in custody. It is this state court determination, made after an adversarial proceeding, that the court of appeals has held not to be given *res judicata* effect.

In a prior opinion, *Brubaker v. King*, 505 F.2d 534 (7th Cir., 1974), the court of appeals had held that state probable cause hearings could not preclude a subsequent civil rights action due to the disparities in issues between a finding of probable cause and a federal false arrest claim. The *Brubaker* opinion was, however, specifically overruled by this Court in *McCurry* which stated:

> In *Brubaker v. King*, 505 F.2d 534, 537-538, the Court of Appeals for the Seventh Circuit held that since the issues in the state and federal cases were different—the legality of police conduct in the former and the good faith of the police in the latter—the state decision could not have preclusive effect in the federal court. *This solution, however, fails to recognize that a state court decision that the police acted legally cannot but foreclose a claim that they acted in bad faith.* 449 U.S. at 102. (emphasis added)

Notwithstanding the clear opinion of this Court, the court of appeals continued to follow its prior rulings that a state court finding of probable cause has no preclusive effect on subsequent false arrest claims.

The court of appeals stated that it did not need to follow this Court's opinion in *Allen* because:

> . . . At most, the footnote in *Allen* suggests that we erred in thinking that there could never be identity of issues in a preliminary hearing and a Section 1983 suit. (Appendix A, p. 5a.)

However, footnote 18 did more than "suggest" that it might be possible to have identical issues in a probable cause hearing and a federal civil rights false arrest

action, it explicitly stated that a state court finding of probable cause conclusively bars a later false arrest claim. It is apparent that the court of appeals does not approve of the use of collateral estoppel in civil rights cases, the direct holding in *Allen*. This is clearly indicated by the court's conclusion that:

> We doubt that collateral estoppel would ever be appropriate solely on the basis of a preliminary hearing. . . . (Appendix A, p. 9a.)

The court of appeals' opinion in this case completely denudes the holding in *Allen*. It suggests that *Allen* is limited to suppression hearings (Appendix A, p. 9a), or that *Allen* applies to cases only where the state court parties fully present their case to the state court. Such distinctions are meaningless. *Allen* clearly holds that state court findings are subject to full *res judicata* and collateral estoppel effects, and the decision of the court of appeals effectively ignores *Allen* and reinstates the holding of *Brubaker* which this Court has repudiated.

A writ of certiorari should issue in this case because of the clear conflict between the court of appeals' opinion below and this Court's holding in *Allen* and the unjustified refusal by the court below to apply collateral estoppel in civil rights actions.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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June 4, 19[illegible]

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 80-2522 and 80-2565

N. W. WHITLEY,

Plaintiff-Appellee, Cross-Appellant,

v.

GEORGE W. SEIBEL, individually and as a police officer of the Chicago Police Department,

Defendant-Appellant, Cross-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76-C-2959—Frank J. McGarr, *Judge.*

ARGUED DECEMBER 11, 1981—DECIDED MARCH 25, 1982

Before CUMMINGS, *Chief Judge*, SPRECHER and POSNER, *Circuit Judges.*

CUMMINGS, *Chief Judge.* N. W. Whitley was arrested and charged with crimes for which he had a complete alibi defense. Nonetheless he remained in the Cook County Jail from October 14, 1974, the date of his arrest, until February 3, 1975, when the state asked leave to nolle prosequi the criminal charges and the case was dismissed. Thereafter Whitley filed a damage action under 42 U.S.C. § 1983. We reversed the first judgment in Whitley's favor, *Whitley v. Seibel*, 613 F.2d 682 (7th Cir. 1980) (*Whitley* I), for inadequate jury instructions on an important issue in the case. A new trial ensued, before Judge McGarr, and the jury awarded Whitley

$60,000 in damages. The court also awarded Whitley's attorneys $10,000 in fees under 42 U.S.C. § 1988. The defendant Seibel now appeals a second time, arguing that (1) Whitley is collaterally estopped from bringing a Section 1983 suit under *Allen v. McCurry*, 449 U.S. 90; (2) the jury instructions in the second trial did not cure the defect from which the earlier proceedings had suffered; and (3) the damages awarded were excessive and not supported by the evidence. The plaintiff's cross-appeal asks us to find that the trial judge abused his discretion in awarding only $10,000 in fees. We affirm the decision below in all respects.

I

The facts that underlie Whitley's lawsuit are fully set out in our earlier opinion, *Whitley* I, 613 F.2d at 684-685. Only those relevant to our resolution of this appeal are repeated here. Any ambiguities in the evidence are resolved as the jury must have resolved them in reaching its decision.

Whitley was arrested on a minor traffic charge on October 7, 1974. As he was being taken into custody, a passerby identified him as the perpetrator of an armed robbery and sexual assault that had occurred on the north side of Chicago on the afternoon of October 3. At the station house, the victims of the crimes agreed that Whitley was their assailant, although they had tentatively identified another man earlier. Whitley told Officer Seibel that the identification must be mistaken: he had been at the Des Plaines office of an insurance company on October 3, picking up a claim check. He gave Seibel the business card of the employee he had seen there and the name and address of a shoe store in Chicago where he worked part-time and had cashed the check. On the advice of an assistant state's attorney, Seibel decided not to arrest Whitley for the robbery and assault until the alibi could be checked out and the conflicting identifications resolved.

On October 14, Seibel arrested Whitley for the robbery and assault. In the interval between the first and second arrests Seibel had called a telephone number

Whitley had given him for the insurance company and found it inaccurate. He had also made inquiries in the shoe stores within a two-block area of Broadway, including the one where Whitley was an occasional employee, without finding out anything about Whitley. He had not pursued the eyewitness identification further, or sought more information from Whitley. Although that was the extent of his investigation, Siebel told two assistant state's attorneys, one of whom presented the state's case at the preliminary hearing, that he had checked out Whitley's alibi and that Whitley was definitely not in Des Plaines on the afternoon of October 3.

On November 14, 1974, Whitley went before Judge Wayne Olson in Branch 44 of the Municipal Court. The purpose of the hearing Judge Olson conducted was to determine whether there was probable cause to believe that the crimes had been committed and whether there was probable cause to believe that Whitley had committed them. Appearing at that hearing were the assistant state's attorney; the victims, who were by now prepared to identify Whitley positively; Whitley; and Steven Bernstein, the attorney Whitley had retained two weeks earlier. Although Whitley was entitled under Illinois law to present evidence of his alibi defense, he did not do so. Judge Olson found probable cause to bind Whitley over to the grand jury for indictment.

After the preliminary hearing, Whitley's attorney continued the efforts he had begun earlier to confirm Whitley's alibi. In January, Mr. Bernstein presented the information he had collected to yet another assistant state's attorney. After some consultation the prosecution moved, on the day Whitley's trial was scheduled to begin, to drop the case. Throughout this time Whitley remained incarcerated, unable to post the bond set initially at $10,000 but raised after a bond hearing on October 15 to $25,000.

II

Seibel's first line of attack is that Whitley's Section 1983 suit is basically an action for false arrest and that

Whitley is collaterally estopped[1] from bringing it by Judge Olson's finding of probable cause in the preliminary hearing. When this same argument was made in *Whitley* I, we rejected it on the basis that the issues in a preliminary hearing and in a Section 1983 suit were not the same. 613 F.2d at 685, relying on *Brubaker v. King*, 505 F.2d 534 (7th Cir. 1974). The Supreme Court in *Allen v. McCurry*, 449 U.S. 90, 102 n. 18, has explicitly disapproved of our reasoning in *Brubaker*: if a Section 1983 plaintiff must show both that an arrest was illegal and that the arresting officer had no reasonable, good-faith belief in its legality, the determination that an arrest is supported by probable cause (and therefore legal) logically undercuts the Section 1983 claim.

Seibel reads the Supreme Court's criticism of *Brubaker* as a directive to apply collateral estoppel to bar Whitley's suit. We take a narrower view of the significance of *Allen*'s footnote 18. *Allen* holds that collateral estoppel is as applicable to Section 1983 suits

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[1] A succinct definition of collateral estoppel and *res judicata* (merger and bar) was given more than half a century ago by Learned Hand:

> A judgment may be a merger or bar, or it may be an estoppel. For the first, the cause of action must be the same; for the second, they may be as different as possible. On the other hand, the merger or bar extends, not only to all matters pleaded, but to all that might have been, while the estoppel extends only to facts decided and necessary to the decision. All this is very old law.
>
> *Irving National Bank v. Law*, 10 F.2d 721, 724 (2d Cir. 1926)

The passage of time necessitates some qualification. Merger and bar apply only to the original litigants or their privies. Collateral estoppel can be invoked by and against new litigants. It can be used as a shield against a new plaintiff by a defendant who was a party to the former litigation, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313. Or it can be used as a sword by a new plaintiff against a defendant who was a party to the former litigation, *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322. It can never be used as a sword against a party who has not previously had his day in court.

as it is to other kinds of litigation; *Allen* does not adopt any "new, more stringent doctrine of collateral estoppel." 449 U.S. at 95 n. 7. Traditionally the criteria that must be satisfied before collateral estoppel can appropriately be invoked are:

> whether the issue sought to be concluded is the same as that involved in the prior action; was litigated in the prior action; was in fact judicially determined in the prior action; and whether the judgment in the prior action was dependent upon the determination made of the issue. Only if *all four* of these questions are answered in the affirmative is the issue concluded under the doctrine of collateral estoppel.
>
> 1B Moore's Federal Practice, ¶0.443[1] (1965) (footnotes omitted, emphasis added)

At most, the footnote in *Allen* suggests that we erred in thinking that there could never be identity of issues in a preliminary hearing and a Section 1983 suit. Our task here is to examine the criteria as they apply to Whitley's suit.[2]

A. *Identity of Issues*

The first step is to determine what the issues were in the preliminary hearing and in Whitley's Section 1983 suit. As noted above, Judge Olson was required to decide whether there was probable cause to believe that the crimes had been committed by Whitley. In practice police records and eyewitness testimony would often be dispositive.[3] Whitley's Section 1983 suit was based on two specific derelictions by Seibel: his failure to investigate in reasonable fashion a plausible alibi given

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[2] Our discussion of Illinois pre-trial procedure throughout the opinion is based on the law as it existed at the time of Whitley's arrest and incarceration.

[3] Direct testimony of Kent Brody (former assistant public defender), Tr. 585; cf. cross-examination of Judge Olson, Tr. 769.

by a person in custody;[4] and his misrepresentations to the prosecuting authorities that he had checked the alibi and found it to be false.[5] Thus this Section 1983 suit attacked the integrity, rather than the sufficiency, of the evidence. Unlike *Brubaker*,[6] it did not seek to relitigate the probable cause finding, but charged that the arresting officer's bad faith vitiated the finding. Although we concede that there will be identical issues in a preliminary hearing and a Section 1983 suit when only the legality of the arrest is at issue, we do not find that proposition applicable to this case.

B. *Litigation in the Prior Proceeding*

Whitley did not put on his alibi defense at the preliminary hearing, and so did not attack the veracity of the state's case against him. Ordinarily an issue that is not

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[4] The trial court assumed, based on the discussion in *Whitley* I, 613 F.2d 685-686 (distinguishing *Baker v. McCollan*, 443 U.S. 137), that this theory was still viable on remand. Seibel does not challenge that assumption on appeal.

[5] On October 8, Seibel wrote in a report that he had "subsequently found that the offender was not in the location claimed and, therefore, had no alibi." Tr. 260. On October 14, he again wrote, "The undersigned was able to establish that Whitley was not where he had claimed at the time of the occurrence." Tr. 261. Whitley's October 14 arrest was approved on the basis of this representation, and Seibel's reports were instrumental in the state's case at the preliminary hearing.

The district court instructed the jury that even if it found poor investigation and factual misrepresentation, Seibel's good-faith belief that he had acted reasonably under the circumstances would be a complete defense. Plaintiff's instruction 2 (reprinted in Joint Appendix). Seibel does not challenge the jury's decision that his qualified immunity was exceeded in this case.

[6] In *Brubaker*, the Section 1983 plaintiff had been arrested as he picked up a parcel of hashish at an Indiana post office. He made bond, but was later rearrested with a warrant. Each arrest was considered by a different judge, and each judge found probable cause. Criminal charges were later dismissed by the state. The only issue in the Section 1983 suit appears to have been the existence *vel non* of probable cause.

litigated in one proceeding is not barred later—that is a basic difference between claim preclusion (*res judicata*) and issue preclusion (collateral estoppel).[7] Seibel argues in effect that Whitley waived his alibi defense by not raising it.

There is some authority in this Circuit for treating the failure to raise an issue as tantamount to waiver and for giving the waiver collateral estoppel effect.[8] But there must be "reason to believe that the failure to litigate the matter in fact was a recognition of the opposing claim." *Palma v. Powers*, 295 F.Supp. 924, 936 (N.D. Ill. 1969). In *Palma*, that inference was possible: the allegedly illegal search had produced all the evidence against defendants charged with violating Illinois gambling laws, and the defendants went through the entire state criminal trial without ever seeking to have the evidence suppressed. They had every incentive to raise the issue to ward off conviction, and the fully adversarial hearing on a motion to suppress gave them the opportunity to do so. Accordingly, their Section 1983 claim, based on the illegal search, was precluded.

We have no such assurance about Whitley's silence. He surely did not admit the lack of an alibi. Indeed his experience was so unnerving precisely because he knew he was innocent and had given the police information to confirm his innocence, but his imprisonment still continued. Nor is the preliminary hearing comparable to a suppression hearing. It is a relatively summary proceeding, designed only to reach an interim decision in the process of bringing a defendant to trial. The suspect has

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[7] See note 1 *supra*. *Res judicata* bars "'not only • • • every matter which was actually offered and received to sustain the demand or to make out a defense, but also • • • every ground of recovery or defense which might have been presented.'" *Harper Plastics v. Amoco Chemicals Corp.*, 657 F.2d 939, 945 (7th Cir. 1981), quoting *Mendez v. Bowie*, 118 F.2d 435, 440 (1st Cir. 1941), certiorari denied, 314 U.S. 639.

[8] This authority is, however, soundly criticized in G. Hazard, *Revisiting the* Second Restatement of Judgments: *Issue Preclusion and Related Problems*, 66 Cornell L. Rev. 564, 581-585 (1981). Professor Hazard served as Reporter for the *Restatement (Second) of Judgments*.

no right to discover what is in the prosecutor's arsenal,[9] or to appeal the finding of probable cause.[10] In fact, the preliminary hearing can be dispensed with entirely and the case taken directly to a grand jury.[11] Under these circumstances a suspect may not have had time to prepare his case when the preliminary hearing is held, or may have strategic reasons for waiting until trial to make his defense. There is thus no basis for inferring that a decision not to raise an issue amounts to an admission that the issue's converse is true.

C. *Other Factors*

Judge Olson had no occasion to consider Whitley's alibi or the quality of Seibel's investigation and reports. The third and fourth criteria—that the issues be determined and that the determination be necessary to the judgment—are clearly unmet. However, even if Judge Olson had made rulings, it would be almost impossible to tell whether a finding of probable cause necessarily depended on those rulings.

> [A probable cause determination] does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt.
>
> *Gerstein v. Pugh*, 420 U.S. 103, 121

Because the state's burden of proof is so low, a variety of issues could be resolved in favor of the suspect without necessitating a finding of no probable cause.

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[9] Testimony of Judge Olson, Tr. 771-772. The arrest report or "pink sheet" attached to the outside of the file was available, but there was no way to compel the production of investigators' supplementary reports. State's attorneys did sometimes turn supplementary reports over to defense lawyers voluntarily.

[10] See J. Scarboro and J. White, *Constitutional Criminal Procedure* 125 (1977).

[11] See Judge McGarr's remarks. Tr. 423-424.

D. *Conclusion*

Nothing in *Allen v. McCurry* requires us to depart from the traditional precept that a party is not estopped to raise issues that he has had less than a "full and fair opportunity" to litigate in a prior proceeding. 449 U.S. at 95 n. 7, 100-101. We doubt that collateral estoppel would ever be appropriate solely on the basis of a preliminary hearing;[12] we hold that it is certainly not appropriate on the facts of this case.

III

Although we are not willing to accord preclusive effect to the preliminary hearing, we agree that it has important factual and legal consequences for this Section 1983 suit. At the first trial the jury was instructed that

> The failure of Mr. Whitley or his attorney to assert an alibi at the preliminary hearing is of no significance to your determination here because it would

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[12] *Allen* itself involved a motion to suppress. The criminal conviction, including the ruling on the motion, was appealed to the intermediate Missouri court. 449 U.S. at 91. A sampling of post-*Allen* decisions shows collateral estoppel applied in the following, distinguishable contexts: probate court decisions, appealed, foreclose Section 1983 suit alleging bias by probate judge and conspiracies of various sorts, *Tonti v. Petropoulous*, 656 F.2d 212 (6th Cir. 1981); guilty plea in tax evasion case forecloses relitigation of fraud in civil suit for penalty, *Fontneau v. United States*, 654 F.2d 8 (1st Cir. 1981); state habeas proceedings, if they satisfy the standard of *Townsend v. Sain*, 372 U.S. 293, preclude Section 1983 suit to expunge IRS disbarment based on allegedly unconstitutional criminal conviction, *Silverton v. Dept. of Treasury*, 644 F.2d 1341 (9th Cir. 1981), certiorari denied, 50 U.S.L.W. 3278; disbarment proceedings bar relitigation of factual issues but not constitutional claims in Section 1983 suit against the justices of the Iowa Supreme Court, *In re Randall*, 640 F.2d 898 (8th Cir. 1981).

There is a thoughtful discussion of the problems of collateral estoppel based on criminal proceedings in *Richardson v. Fleming*, 651 F.2d 366, 373-375 (5th Cir. 1981) (dictum).

> avail them nothing to have done so. The judge would have been acting improperly had he dismissed the case at that juncture on the basis that there was an alibi. That's not his function.
>
> *Whitley* I, 613 F.2d at 686

We held that such an instruction was prejudicial error because it was likely to obscure three issues: (1) the extent of damages for which the defendant could be liable; (2) the factual determination of how much information Whitley actually gave Seibel about his alibi; and (3) the defendant's burden of proof, which could be distorted if the jury thought—contrary to *Baker v. McCollan*, 443 U.S. 137—that Seibel had an absolute duty to investigate every claim of innocence. On remand we required that the jury "be properly instructed on the [nature of] the preliminary hearing and permitted to consider plaintiff's failure to offer his alibi." *Whitley* I at 687-688.

Seibel now argues that the second trial judge did not follow our directions. Judge McGarr refused defendant's instructions 27 and 28, which repeated verbatim the language of Ill. Rev. Stat. 1973, chap. 38 §§ 109-3(a) and (b).[13] Instead he gave plaintiff's instruction 31:

> The finding of probable cause at the preliminary hearing does not, in any way, mean that the defendant Seibel had probable cause to arrest the plaintiff and charge him with the offenses.

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[13] Ill. Rev. Stat. 1973, chap. 38 § 109-3 provides:

> (a) The judge shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant.
>
> (b) If the defendant waives preliminary examination the judge shall hold him to answer and may, or on the demand of the prosecuting attorney shall, cause the witnesses for the State to be examined. After hearing the testimony if it appears that there is not probable cause to believe the defendant guilty of any offense the judge shall discharge him.

Defendant's instruction 27 quoted (a); instruction 28 quoted (a) and the second sentence of (b).

> You may consider, in the light of all the evidence in the case, whether the plaintiff could or should have offered the alibi at the preliminary hearing, and whether this would have resulted in a reduction of the time that plaintiff was incarcerated.

Seibel's objection to the first paragraph is that it does not tell the jury that, "[a]s stated in *Allen*, the finding of probable cause in the preliminary hearing is a *binding determination* that probable cause existed for the arrest." Br. 11 (emphasis added). Part II *supra* shows that Seibel overestimates the effect of *Allen*. Seibel also objects generally that the instruction failed to apprise the jury of "the legal mechanics of preliminary hearings in Illinois." *Id.* It is true that the instruction does not speak in technical language; it is not true that the jury was inadequately informed about how preliminary hearings work or about the consequences of Whitley's silence.

Judge McGarr did not disregard our mandate. He improved on it. The jury heard testimony from all three of the assistant state's attorneys involved in Whitley's case, including the one who presented the state's evidence before Judge Olson;[14] from an assistant public defender who had participated in roughly five hundred preliminary hearings in Judge Olson's courtroom;[15] and from Judge Olson himself.[16] Mr. Bernstein testified and was vigorously cross-examined about the quality of his representation of Whitley at the preliminary hearing.[17] The testimony as a whole served to educate the jury in the "legal mechanics" of Illinois criminal procedure, and the instruction invited them to apply that education to the central issues in this case.

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[14] Richard Hansen, who told Seibel to check the alibi and resolve the identification problems on October 7, Tr. 96-146; Ernest Bloomquist, who approved the filing of charges against Whitley on October 14, Tr. 146-162; Timothy Lee, who conducted the state's case at the preliminary hearing, Tr. 413-459.

[15] Kent Brody, Tr. 580-621.

[16] Judge Wayne Olson, Tr. 754-784.

[17] Tr. 639-733 (cross-examination at 696-723).

Seibel apparently thinks that the instruction had to be misleading because the jury did not excuse his conduct or limit Whitley's damages to the period before the preliminary hearing. But it was consistent for the jury to follow the instruction and still not lay the blame at Whitley's door. As Mr. Bernstein and Judge Olson agreed, presenting an unconfirmed alibi defense presented grave risks of later impeachment.[18] Asking for a continuance might have resulted in a prosecutorial decision to take the case directly to the grand jury, and neither Whitley nor his lawyer could be present at the grand jury proceedings.[19] Finally any delay attributable to Whitley would have stopped the running of the time within which the state had to try him, starting an entirely new limitations period.[20] In short, we are satisfied that Judge McGarr gave the jury an appropriate instruction, and that the jury's response to it was within their province as finders of fact.

IV

Defendant's third ground of appeal is that the award of $60,000 in compensatory damages for 113 days of imprisonment was excessive. By turns Seibel hints that there was no evidence, no competent evidence, or no sufficient evidence to support the award.[21]

Our standard of review is narrow. Providing that the appropriate legal criteria were used—and apart from the instruction (Part III *supra*) they are not challenged—the actual measurement of damages is an exercise in fact-finding, which we are not permitted to second-guess unless "after reviewing the entire record, we are 'left with the definite and firm conviction that a mistake has

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[18] Bernstein, Tr. 665-666; Olson, Tr. 780-781.

[19] Bernstein, Tr. 714-715; Olson, Tr. 770-771 (but direct indictment "rare").

[20] Bernstein, Tr. 694; Olson, Tr. 783.

[21] At oral argument counsel for Seibel took the odd position that because no amount of money could compensate for Whitley's injury, the damages awarded should be reduced.

been committed.'" *Busche v. Burkee*, 649 F.2d 509, 518 (7th Cir. 1981), certiorari denied, 50 U.S.L.W. 3278, quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395. We do not have that conviction here. Whitley himself testified about nightmares, insomnia, and nausea after his release from jail.[22] Howard Harris, his erstwhile employer, told the court that Whitley was a changed man, given to depression, vagueness, and tears.[23] Denise Broom, who had lived with Whitley for some time before and after his arrest and had borne him a son, described his nausea, cold sweats, outbursts of crying, and increased irascibility after his release. She finally had to leave him in 1976 taking their child with her.[24] Seibel dismisses this testimony as either interested (Br. 13) or incompetent (Br. 12). We do not see why the people who knew Whitley best before and after the events should have to be characterized as interested. As to the absence of medical or psychiatric testimony,

> While such testimony could have strengthened [the plaintiff's] case, its absence from the record is not fatal to his claims. As the Supreme Court stated in *Carey v. Piphus*, 435 U.S. at 264 n.20, * * * "[a]lthough essentially subjective, genuine injury in this respect [mental suffering or emotional anguish] may be evidenced by one's conduct and observed by others."
>
> *Busche, supra*, 649 F.2d at 519 n. 12

Seibel has a farrago of lesser complaints. Neither wages lost nor attorney's fees paid up to the dismissal of charges were proved, he says. But the amount of fees paid ($575.65) was proved at trial,[25] and the jury was clearly instructed that Whitley did not claim damages for lost wages.[26] The defense was also hampered,

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[22] Tr. 522.

[23] Tr. 473-474.

[24] Tr. 323-324.

[25] Tr. 690-692.

[26] Plaintiff's instruction 29, reproduced in the unpaginated Joint Appendix. Judge McGarr also emphasized the point to the jury. "Mr. Whitley * * * is not making any claim for lost

(Footnote continued on following page)

according to Seibel, by not being able to cross-examine Whitley about earlier arrests and a prior imprisonment that might have caused some of his alleged harm. The record shows that Whitley had been arrested only for the traffic offense that began his troubles here, and for possession of two marijuana cigarettes in 1973. The much-vaunted earlier imprisonment was a three-day stay in the Cook County Jail, apparently on the marijuana charge.[27]

Finally, we have noted a certain irony in Seibel's complaints about the sufficiency of the evidence, since the defendant persuaded the trial court to exclude all testimony about conditions in the Cook County Jail at the relevant period.[28] Having eliminated the possibility of detailed proof of the harm done to Whitley, Seibel cannot now attack the quality of the evidence that was received.

V

The attorneys who represented Whitley asked Judge McGarr to award them fees for 277 hours of work on Whitley's behalf in the second trial. They stated that an appropriate hourly rate for civil rights lawyers of their caliber was $110 an hour, and that a multiplier would be suitable as an incentive or bonus. Judge McGarr awarded them only $10,000, to be divided in whatever manner they chose.

We review a district court's fee decision under 42 U.S.C. § 1988 only for abuse of discretion. As a practical matter, it is a great help to the reviewing court if the district judge gives a detailed statement of the reasons for his decision, so that we can understand how it was made. But the district judge is not required to couch fee

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[28] *continued*
wages as a result of his being incarcerated instead of being able to work at Allen Shoes. So the question of his salary there, part-time, full-time, etc., is not of any consequence to this case." Tr. 634-635.

[27] Tr. 462-466, 575.

[28] Tr. 734-736.

decisions in exactly the terms we first outlined in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), certiorari denied, 425 U.S. 997.

> The factors set out in *Waters* and adopted by this court in § 1988 cases in *Muscare v. Quinn*, 614 F.2d 577 (7th Cir. 1980), are guidelines. It is not required that each of the enumerated factors be considered and passed on specifically. The award is to be based on the totality of the case in light of the purpose of the act: "to permit and encourage plaintiffs to enforce their civil rights."
>
> *Coop v. City of South Bend*, 635 F.2d 652, 655 (7th Cir. 1980) (citation omitted)

Our reading of Judge McGarr's order convinces us that he relied on the following factors to arrive at the $10,000 figure:

(1) $100 an hour is not facially unreasonable for trial time, but office time should be billed at a lower rate. Only about one-fourth of the total hours represented trial time, according to the affidavits submitted by Whitley's attorneys.[29]

(2) There was some duplication of effort between the two lawyers. The defendants challenged some portion of 56 hours on this basis.[30]

(3) The case redressed an individual wrong, rather than benefiting a class or vindicating the public interest. The policy underlying fee awards may be less compelling in such a suit.[31]

(4) Fees are also less necessary when the judgment itself is substantial and there is a contingent fee agreement between lawyer and client. Here, as

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[29] The affidavits and time records of the lawyers are set out in the Joint Appendix. At oral argument counsel inadvertently reversed the figures for in-court and office time.

[30] Memorandum in Opposition to Plaintiff's Motion for Attorney's Fees 9-13 (reprinted in Joint Appendix).

[31] See, *e.g.*, *Hughes v. Repko*, 578 F.2d 483, 492 n. 5 (3d Cir. 1978) (Garth, J., concurring).

we learned at oral argument, Whitley had agreed to pay Bernstein one-third of any award. Presumably Messrs. Bertucci and Buffardi conducted the trial because of Mr. Bernstein's importance as a witness for Whitley.[22]

We are persuaded that these factors represent a reasonable basis for determining the award of fees and that Judge McGarr's application of them was a sound exercise of his discretion. We note that this case is distinguishable from *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 585 (7th Cir. 1981), where the lack of detailed time records combined with the district judge's unexplained reduction of the amount to make appellate review of the fee decision in a patent case impossible.

The judgment from which appeal is taken is affirmed in its entirety, with costs to Whitley on the appeal (No. 80-2522) and to Seibel on the cross-appeal (No. 80-2565).

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

---

[22] American Bar Association, Code of Professional Responsibility, EC 5-9; DR 5-101(B), 5-102 (1978).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge: Honorable Frank J. McGarr

Cause No.: 76 C 2579

Date: June 2, 1980

Title of Cause: N. W. Whitley v. George Seibel

Brief Statement of Motion: On trial

Trial held. Jury verdict: "We, the jury, find for the plaintiff and against the defendant. We assess the damages in the sum of $60,000.00." Enter judgment on the verdict. Trial ends. Post trial motions to be filed in 20 days.—McGarr, J.

No. 81-2242

Office - Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GEORGE W. SEIBEL, individually and as a police officer of the City of Chicago Police Department,

Petitioner,

vs.

N. W. WHITLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTION PRESENTED

Whether a state court finding of probable cause, at a preliminary hearing, collaterally estops a Section 1983 action, based on the arresting officer's failure to investigate, in a reasonable fashion, a plausible alibi and the officer's misrepresentations to the prosecuting authorities that he checked the alibi and found it to be false, where there was no full and fair opportunity to litigate the Section 1983 suit at the preliminary hearing.

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IN THE

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Petitioner,

vs.

N. W. WHITLEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The petitioner's recitation of the facts of the case totally ignores the evidence presented to the jury to such an extent that the respondent is compelled to offer the following statement.[1]

[1] At the trial, the respondent called fourteen (14) witnesses and the petitioner one (1), covering approximately 800 pages of evidence. Since an adequate resolution of the petition for writ of certiorari requires an analysis of the evidence below, the respondent has requested the Clerk of the Seventh Circuit Court of Appeals to certify and transmit to this Court parts of the record below, which contains the evidence presented, in accordance with Rule 19 of the Rules of the Supreme Court of the United States.

The Seventh Circuit's opinion recites that the facts that underlie the respondent's lawsuit are also set forth in an earlier Seventh Circuit opinion: *Whitley* v. *Seibel*, 613 F. 2d 682 (7th Cir. 1980)(Whitley I).

The respondent was arrested and charged with crimes for which he had a complete alibi defense.[2]

When arrested on October 7, 1974, for a minor traffic charge and taken to the station house, the victims of an armed robbery and sexual assault said that the respondent was their assailant, although they had previously identified the picture of another man as the offender. On October 7, 1974, while in custody, the respondent gave the petitioner a business card of an employee (Catherine Ellenbecker) of an insurance company where the respondent was on the date and time of the crime. The respondent advised the petitioner that he was there to pick up a check in settlement of an insurance claim. The respondent also advised petitioner of the name and address of his employer where he had cashed the settlement check. An assistant state's attorney reviewed this evidence, but declined to authorize the respondent's arrest until petitioner checked out the respondent's alibi and the conflicting identification could be resolved.[3]

The next day, October 8, 1974, the petitioner prepared a police report and stated therein that he had "... found that the offender (respondent) was not in the location claimed and, therefore, had no alibi." The petitioner admitted that he never contacted the insurance company or even conversed with the above-named employees of said company. (T. 236-37)

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[2] The testimony of two employees of Liberty Mutual Insurance Company, Des Plaines, IL., namely Robert J. Devlin and Catherine Ellenbecker, conclusively established that respondent was in their offices on the date and time of the crimes for which the respondent was arrested and prosecuted. (T. 361, 376) Furthermore, Seibel failed to advise the prosecutors or include in any of his reports that Denise Broom corroborated the respondent's alibi on the night of October 7, 1974, in the police station. (T. 211, 213).

[3] Assistant State's Attorney Edward Hansen also testified that the petitioner never showed him the original police report (case report) which conflicted with the victims' recitation of the events. (T. 100) Petitioner also told this witness that the victims had positively identified a photograph of another person (Ronald Wells) as their offender (T. 105), and due to this fact, he advised Seibel to try and correct this problem by further identification procedures. (T. 105).

The petitioner arrested the respondent on October 14, 1974, and thereafter sought retroactive authorization for the arrest from an assistant state's attorney. (613 F. 2d at 684; T. 267) In doing so, the petitioner did not advise the assistant state's attorney of the alibi, but only that the prior assistant state's attorney advised petitioner to resolve the conflicting identification prior to the arrest. The petitioner told this second assistant state's attorney on October 14, 1974 (the date of the arrest) that the identification question had been resolved when, in fact, it had not.[4]

On October 14, 1974, the petitioner prepared a second police report and, in part, it stated that he was "... able to establish that Whitley was not where he had claimed at the time of the occurrence." (Petitioner's Appendix A, p. 6a, footnote 5.)

The preliminary hearing was held on November 14, 1974, before the state court judge. At the hearing, the petitioner told a third assistant state's attorney that the respondent's alibi had been determined to be false.[5]

When arrested, the respondent's bond was Ten Thousand ($10,000.00) Dollars, but on October 15, 1974, at the respondent's bond hearing, the bond was raised to Twenty-Five Thousand ($25,000.00) Dollars. (Petitioner's Appendix A, p. 3a.)

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[4] Seibel advised this prosecutor that the identification problem had been cured by the respondent's traffic arrest. However, respondent's traffic arrest occurred prior to the former prosecutor's (Hansen) order to correct the identification problem, and not subsequently as prosecutor Bloomquist was led to believe. (T. 147-161).

[5] The third prosecutor, Timothy Lee, also testified that Seibel told him there was no original case report on this matter when, in fact, there was. (T. 417, 418) Mr. Lee further testified about the practice in the preliminary court in Cook County, IL. during this period of time. (T. 426-456).

Two weeks prior to the preliminary hearing, the respondent's family retained an attorney who was unable to confirm the alibi by the time of the preliminary hearing on November 14, 1974, but subsequent to this hearing continued his efforts to so confirm the alibi.[6]

An Illinois preliminary hearing is a relatively summary procedure, designed only to reach an interim decision of bringing a defendant to trial. At that time, an accused had no right to discover an officer's supplemental reports, for example, petitioner's reports of October 7, 1974, and October 14, 1974. The preliminary hearing could be eliminated entirely, and the prosecution could take the case directly to the grand jury.[7]

Concerning the conduct of a preliminary hearing in Cook County, Illinois, the jury heard from the assistant state's attorney (Timothy Lee) who presented the state's case, Judge Wayne Olson[8] who presided at the hearing, Steven J. Bernstein, who defended the respondent at the hearing, and assistant public defender Kent Brody,[9] who had participated in approximately five hundred (500) preliminary hearings in Judge Wayne Olson's courtroom.

At the conclusion of the preliminary hearing, the judge found probable cause and the respondent was bound over to the grand jury, which later indicted him for the crimes.

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[6] Testimony of Attorney Steven James Bernstein indicates that he confirmed the respondent's alibi on December 17, 1974. (T. 647, 649, 652, 667, 668).

[7] Petitioner's Appendix A, p. 8a, footnotes 9, 10, 11.

[8] Testimony of Judge Wayne Olson, T. 754-784.

[9] Testimony of Kent Brody, T. 580-601.

When the alibi was confirmed by the respondent's counsel, the information was presented to another assistant state's attorney who, after further investigation, dismissed all criminal charges against the respondent on the 113th day of his incarceration.[10]

The respondent initiated his civil rights action on July 14, 1976, which claimed that the petitioner failed to investigate, in a reasonable manner, a plausible alibi given by a person in custody and that the petitioner misrepresented to the prosecuting attorneys that either no alibi was given or that the alibi was checked out and found to be false and that the conflicting identifications by the victims had been resolved, all of which were false and established the petitioner's lack of good faith. The petitioner's conduct resulted in respondent's confinement for 113 days, in deprivation of his constitutional rights.

In Whitley I, the jury awarded the respondent Forty Thousand ($40,000.00) Dollars in damages. The Seventh Circuit reversed this award due to the District Court's *sua sponte* oral instruction to the jury regarding Illinois preliminary hearing procedure. (613 F. 2d 682, 686.)

In Whitley II, the jury awarded the respondent Sixty Thousand ($60,000.00) Dollars in damages, and the District Court awarded fees, under Section 1988, in the amount of Ten Thousand ($10,000.00) Dollars.

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[10] Respondent's counsel advised Assistant State's Attorney George Pappas of the alibi and alibi witnesses, on January 2, 1975 (T. 677), who formally moved to dismiss all charges against the respondent on February 3, 1975. (T. 688).

REASONS WHY THE WRIT SHOULD BE DENIED

The Doctrine of Collateral Estoppel Cannot Be Applied to the Facts of This Case, Since the Respondent Did Not Have a Full and Fair Opportunity to Litigate His Section 1983 Suit in the State Court Preliminary Hearing.

The petitioner asserts that the Seventh Circuit's opinion repudiated this Court's decision in *Allen* v. *McCurry*, 449 U. S. 90 (1980).[11]

An analysis of the Seventh Circuit's opinion reveals that it followed the *Allen* decision and held the rule of collateral estoppel inapplicable, based on the evidence.

The Seventh Circuit set forth the criteria of the doctrine of collateral estoppel:

1. whether the issue sought to be concluded is the same as that involved in the prior action;
2. was litigated in the prior action;
3. was in fact judicially determined in the prior action; and
4. whether the judgment in the prior action was dependent upon the determination made of the issue.

(Petitioner's Appendix A, p. 5a, quoting 1B Moore's Federal Practice, paragraph O. 443(1)(1965)).

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[11] Petitioner also attempts to raise an issue (Question Presented) which is incorrect. The probable cause finding, at the preliminary hearing, did not mean probable cause for the *arrest*, but to believe an offense had been committed by the defendant. (See: Petitioner's Appendix A, pp. 5a and 10a, footnote 13 and Statutes Involved (Petition, p. 3). Also, the respondent's Section 1983 claim was based on petitioner's failure to investigate, in a reasonable fashion, a plausible alibi and petitioner's misrepresentations to the prosecuting authorities that petitioner checked the alibi and found it to be false.

The Seventh Circuit stated that only if *all* of the above criteria were met, could there be issue preclusion.

The petitioner's brief evades the *ratio decidendi* of the Seventh Circuit's opinion, claiming that the Seventh Circuit's opinion repudiates the holding in *Allen*. An additional aspect of this handiwork consists of the petitioner's sanitized version of the facts as set forth in the Petitioner's "Statement of the Case".

Well-knowing that the petitioner's conduct and misrepresentations are the linchpin of the Seventh Circuit's decision, the petitioner carefully ignores any discussion of the facts. The Seventh Circuit found that the respondent's Section 1983 suit challenged the "integrity" and not the sufficiency of the evidence at the preliminary hearing. In effect, there was no relitigation of the probable cause finding. The respondent's Section 1983 suit claimed that the petitioner's bad faith *vitiated* the finding at the preliminary hearing. (Petitioner's Appendix A, p. 6a.)

The Seventh Circuit's opinion, in Whitley II, only touched upon some of the evidence adduced at the trial. For a more detailed discussion of the facts, the Seventh Circuit referenced its opinion to *Whitley* v. *Seibel*, 613 F. 2d 682 (7th Cir. 1980) (Whitley I).

In dealing with the issue of collateral estoppel and the *Allen* decision, the Seventh Circuit carefully analyzed the criteria for the applicability of the rule and examined the criteria necessarily in reference to the *facts* adduced at the trial.

The first criterion of the rule examined was the "identity of issues" involved in the two proceedings (preliminary hearing and Section 1983 suit).

The preliminary hearing, conducted by the state judge, decided only whether there was probable cause to believe that the offenses had been committed by the respondent. By

contrast, the respondent's Section 1983 suit raised two specific derelictions (issues) relating to the arresting officer (petitioner):

1. failure to investigate in a reasonable fashion a plausible alibi given by the respondent, who was in custody; and

2. the petitioner's misrepresentations to the assistant state's attorneys that petitioner had checked the alibi and found it to be false. (Petitioner's Appendix A, pp. 5a, 6a.)

The Seventh Circuit, in accordance with the *Allen* opinion, recognized that there would be an identity of issues between a preliminary hearing and a Section 1983 suit, when the civil action solely raises the issue of the "legality of the arrest". Here, the respondent's suit did not seek to relitigate the "veracity" of the state's case at the hearing, but challenged the "integrity" of the preliminary hearing evidence, as tainted by the subsequently revealed conduct and misrepresentations of the petitioner.

The Seventh Circuit reasoned that petitioner's conduct, *viz.* subparagraphs 1 and 2, above, was highly significant in reaching its decision on the issue of collateral estoppel because:

a. the respondent's arrest was approved due to the petitioner's misrepresentations; and

b. the petitioner's misrepresentations were "instrumental" in the state's case at the preliminary hearing.

The Seventh Circuit found that the issues involved in the respondent's Section 1983 suit were totally distinct from the issue involved in the preliminary hearing and, therefore, the first criterion of the collateral estoppel rule was unsatisfied.

The second criterion of the collateral estoppel rule, litigation in the prior action, was also fully considered in the Seventh Circuit's opinion. The petitioner argued that the respondent's failure to raise the alibi at the preliminary hearing amounted to a "waiver" of the alibi. Although the Seventh Circuit recognized that there was authority to the effect that failure to raise an issue is tantamount to waiver, the Court found that there was no waiver of the respondent's alibi. In order for the waiver to have collateral estoppel effect, there must be " '. . . reason to believe that the failure to litigate the matter in fact was a recognition of the opposing claim. *Palma* v. *Powers*, 295 F. Supp. 924, 936 (N. D. Ill. 1969).' " (Petitioner's Appendix A, p. 7a) The Seventh Circuit found that "Whitley's silence" at the preliminary hearing could not be equated with "recognition of the opposing claim" because

a. respondent knew he was innocent, gave the arresting officer (petitioner) the information (insurance adjuster's business card) to confirm his alibi (innocence), yet he was arrested and imprisoned;

b. the preliminary hearing procedure in Illinois, effective on the date of the respondent's criminal prosecution, was a relatively "summary proceeding, designed only to reach an interim decision";

c. an accused has no right to discovery at the preliminary hearing, therefore, the respondent could not obtain production of the petitioner's police reports and other officers' reports;

d. respondent could not appeal the finding of probable cause;

e. the preliminary hearing could be dispensed with and the prosecution could take the case "direct" to the grand jury for an indictment; and

f. the respondent did not have sufficient time to prepare his case, i.e. confirm the alibi, *via* witnesses who would be prepared to testify and withstand cross-examination.[12]

Because of the above reasons, the Seventh Circuit did not find any basis to conclude "that the failure to litigate the matter in fact was a recognition of the opposing claim."

The third criterion of the rule that the issue was, in fact, judicially determined in the prior action, also was not satisfied, in the opinion of the Seventh Circuit.

> Judge Olson had no occasion to consider Whitley's alibi or the quality of Seibel's investigation and reports. (Petitioner's Appendix A, p. 8a.)

Due to the circumstances of this case, the petitioner's conduct and misrepresentations were unknown at the time of the preliminary hearing and could not have been considered by the state court judge, therefore the issues pertaining to petitioner Seibel's investigation were not judicially determined in the prior action.

Finally, the Seventh Circuit held that the fourth criterion was also unmet. Realizing the nature and function of a preliminary hearing, the Seventh Circuit concluded that "... a variety of issues could be resolved in favor of the suspect without necessitating a finding of no probable cause." (Petitioner's Appendix A, p. 8a.) In short, the Court stated that it is impossible to ascertain whether a finding of probable cause necessarily depended on the determination of the issue.

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[12] The importance of confirming an alibi (witness) prior to presenting such evidence was readily apparent to the state judge (Judge Wayne Olson), the respondent's defense attorney (Steven Bernstein), and the Seventh Circuit. (Petitioner's Appendix A, p. 12a, fn. 18.)

At the conclusion of this discussion, the Seventh Circuit expressed doubt that collateral estoppel "... would ever be appropriate *solely* on the basis of a preliminary hearing ..." and emphasized "... that *it is certainly not appropriate on the facts of this case.*" (Petitioner's Appendix A, p. 9a.) (Emphasis supplied.)

The petitioner Seibel argues that this Court's opinion in *Allen* applies regardless whether the party has had an opportunity to "fully present their case to the state court". (Petitioner's Brief, p. 7.) The petitioner claims that such a distinction is "meaningless". The "distinctions" delineated in the Seventh Circuit's opinion are far from meaningless. Instead, those "distinctions" underscore the factual differences between *Allen* and the present case. In *Allen*, there was no hint that McCurry was not given a "full and fair opportunity" to litigate the issue (unreasonable search and seizure) in the state court action. In the present case, it cannot be overlooked that at the preliminary hearing, the petitioner's conduct, in most respects, engineered the outcome of the hearing. As noted in the Seventh Circuit's opinion, Seibel's misrepresentations were "instrumental in the state's case" at the hearing. (Petitioner's Appendix A, p. 6a, footnote 5.)

The petitioner's suggestion that *Allen* was disregarded or "denuded" by the Seventh Circuit's opinion, lacks merit. Petitioner seeks to extend the holding in *Allen* to any state court proceeding regardless of the nature of the proceeding or the scope of the hearing. Under the petitioner's analysis of *Allen*, as long as there was a state court proceeding, collateral estoppel applies. Petitioner totally ignores the import of the Seventh Circuit's statement that collateral estoppel was "certainly not appropriate on the facts of this case". (Petitioner's Appendix A, p. 9a.) Petitioner's conduct, partly consisting of misrepresentations to three assistant state's attorneys and falsification of official police reports, totally "vitiated" the finding at the preliminary hearing.

In *Whitley I*, the Seventh Circuit evaluated the impact of the petitioner's conduct:

> "It appears from the testimony that had that assistant state's attorney been fully and honestly briefed by the defendant (petitioner) and had not been misled, it is very doubtful that the arrest would have been authorized." 613 F. 2d at 686.

That reference pertains to petitioner's misrepresentations to the prosecutor to obtain retroactive authorization for respondent's arrest. Petitioner's "conduct" continued through the preliminary hearing, where he again misrepresented the facts to yet another prosecutor, and a finding of probable cause was rendered.

Clearly, the facts of this case illustrate that the respondent was not given a "full and fair opportunity" to litigate the issues in his Section 1983 suit, in the prior state court proceeding, and could not have, due to the petitioner's conduct and the nature of the hearing involved.

The Seventh Circuit clearly recognized the shortcomings of the preliminary hearing versus an evidentiary hearing on a motion to suppress, in terms of litigation of Section 1983 issues. (See: Petitioner's Appendix A, p. 9a, footnote 12.)

To accept the petitioner's argument that collateral estoppel applies in this case, one would be required to ignore totally the petitioner's conduct and false representations that precipitated the respondent's arrest and the finding of probable cause.

Clearly, the Seventh Circuit followed the *Allen* decision and closely examined the impact of the petitioner's conduct and misrepresentations on the state court determination, as well as the nature of that process (the state court preliminary hearing), concluding that the respondent was not afforded "a full and fair opportunity" to litigate his Section 1983 claim.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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